

Dockbuilders Local Union No. 1456, of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Underpinning and Foundation Constructors, Inc.) and Robert Heaney.
Case 2-CB-13323

February 28, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On October 24, 1991, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dockbuilders Local Union No. 1456, of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that those rights may be affected by an agreement requiring membership in a labor organization, as a condition of employment, as authorized in Section 8(a)(3) of the Act.”

2. Substitute the attached notice for that of the administrative law judge.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order and the notice to conform more fully to the violation found.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Underpinning and Foundation Constructors, Inc., or any other employer to refuse to hire or otherwise discriminate against Robert Heaney because he is not a member of our Union, his membership having been terminated for some reason other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that those rights may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL notify Underpinning and Foundation Constructors, Inc. in writing that we have no objection to the employment of Robert Heaney and we will furnish him with copies of such notification.

WE WILL make Robert Heaney whole for any loss of earnings and benefits he may have suffered as a result of the discrimination against him.

**DOCKBUILDERS LOCAL UNION NO.
1456, OF THE UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO**

Leah Z. Jaffe, Esq. and David A. Pollack, Esq., for the General Counsel.

Ira A. Sturm Esq. (Manning, Raab, Delay & Sturm), for the Respondent.

Arthur Z. Schwartz, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz), for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on September 16, 1991. The charge was filed June 29, 1990, and the complaint was issued on March 15, 1991. In substance the complaint alleged that on or about June 28, 1990, the Union caused the Employer, Underpinning and Foundation Constructors, Inc., to refuse to hire Robert Heaney, whose membership in the Union had been terminated for reasons other than his failure to pay the required periodic fees and dues.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that Underpinning and Foundation Constructors, Inc. is an employee engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

For many years the Union has had a collective-bargaining relationship with an association of employers called the General Contractors Association of New York. The contract which was in effect at the time of the events here, ran for a term from July 1, 1987, to June 30, 1990. Pursuant to the collective-bargaining relationship, employers may utilize the Union as a source of employment. However, it is agreed that the Union does *not* operate an exclusive hiring hall. In his respect, the testimony showed at least half the jobs are obtained through private contacts between employers and employees.

Robert Heaney was a member of the Union for about 35 years before his expulsion on June 25, 1990. In this respect, he had been found guilty on March 15, 1989, of violating certain provisions of the Union's constitution. As a consequence, Heaney was fined \$1200 but thereafter refused to pay the fine. Heaney was expelled from the Union because of his refusal to pay the aforementioned fine and not for any other reason. In this regard, his dues were paid up through the period ending June 30, 1990, and the Union refused to accept his dues thereafter. In short, Heaney's expulsion from the Union was for "some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

George James, a union officer, testified that on several occasions after Robert Heaney was fined, he urged him to pay the fine and appeal the decision within the Union. James states that he did this because he was concerned that if Heaney was expelled from the Union this would adversely affect his pension rights because they are dependent on Heaney's obtaining employment with companies contractually obligated to make payments to the pension fund.¹

Robert Heaney's son, William, was employed during June 1990 as a foreman for Underpinning and Foundation Constructors, Inc. That company had a contract with the Union and was performing a job at West Fourth Street in Manhattan. William Heaney testified that on June 28, 1990, having been apprised that a drill rig was to arrive at the jobsite, he

decided to hire his father to perform work in relation to that machine. He states that in accordance with his prior practice as a foreman at other jobs, he called the union hall to inform them that he intended to hire his father for this job. (In this regard, the record shows that although not required, it is common practice for foremen to advise the union hall when people are hired directly by the employer without utilization of the hiring hall.) In any event, when William Heaney called the union hall, he happened to get James on the phone. William Heaney's testimony which I credit, was as follows:

A. Okay. I told Mr. James that there was a drill rig coming in and I wanted to put my father on it. And he said that I couldn't do it because my father is no longer a member of 1456. So I told him that Mr. Devine or the Local as a whole accepted his union dues for that remaining quarter. And he said that money would be refunded. And he said this was from the District. I believe it was from the International to the District Council to the union.

ADMINISTRATIVE LAW JUDGE: What did Mr. James say, forgetting about what happened, just what he said

THE WITNESS: I believe he said the District Council.

ADMINISTRATIVE LAW JUDGE: Okay.

Q. Did he say why the money was being refunded?

A. Because my father refused to pay his fine.

Q. And did you hire your father?

A. No.

Q. Why not?

A. He didn't have a union card.

There is no contention made by the General Council that the Union by any of its agents, at any time, threatened William Heaney in an effort to get him not to hire his father. Nor is there any contention or evidence that the Union engaged in any other type of coercive action against William Heaney or any other agent of Underpinning and Foundation to that end.²

III. ANALYSIS

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Inasmuch as Robert Heaney's membership in the Union was terminated for reasons other than his failure to tender periodic dues and/or initiation fees, the only issue in this case is whether the Union, by virtue of the single conversation between James and William Heaney, caused, within the

¹ For many years, Heaney was employed by the city of New York and by 1990 had not yet worked a sufficient time with private contracting employers to be eligible for a vested pension. Under the collective-bargaining agreement, employers make contributions to a jointly administered pension fund based on the amount of time worked by the covered employee. Therefore, unless a man can find work with a covered employer, no contributions will be made on his behalf to the fund.

² This particular job ended in September 1990 and some, but not all the dock builders employed on the crew moved to another job.

meaning of Section 8(b)(2), Underpinning and Foundation Constructors, Inc. to refuse to hire Robert Heaney.³

In *International Stereotypers Local 120 (Dow Jones)*, 175 NLRB 1066 fn. 3 (1969), the Board held that a union will be found to have caused an employer to discriminate even in the absence of threats or coercion, if the Union's request is acceded to. The Board stated:

The Trial Examiner held that "if Respondent's objection to [Anderson's transfer] had amounted to no more than simple request, this might not have satisfied the term 'cause or attempt to cause' as used in the Act." We do not agree. In accordance with our previous holdings, we hold in this case that a union's efficacious request that an employer discriminate against an employee is unlawful We do not find it necessary, therefore, to determine whether the Respondent's request was fortified by a threat.

Although it is true that James did not initiate the conversation with William Heaney and did not make any threats, the evidence does establish that he did say, in effect, that Heaney could not hire his father for the drill rig job. Further, the evidence shows that William Heaney did not hire his father as a consequence of this conversation. Accordingly, under the rationale of *International Stereotypers*, supra, I conclude that the Union violated Section 8(b)(2) of the Act by causing the employer not to hire Robert Heaney as alleged in the complaint.

CONCLUSION OF LAW

By causing Underpinning and Foundation Constructors, Inc. to refuse to hire Robert Heaney, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(2) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Union has caused Underpinning and Foundation Constructors, Inc. not to hire Robert Heaney, I shall recommend that it be ordered to notify that company, in writing, that it has no objection to his hiring without regard to his membership or his payment of any fines that he may owe to the Union. I shall further recommend that the Respondent make Robert Heaney whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him from the date that he would have been hired, less any net interim earnings.⁴ The amount of backpay shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as com-

puted in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Dockbuilders Local Union No. 1456, of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Causing or attempting to cause Underpinning and Foundation Constructors, Inc., or any other employer to refuse to hire or otherwise discriminate against Robert Heaney, because he is not a member of the Union; his membership having been terminated for some reason other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Underpinning and Foundation Constructors, Inc., in writing, that it has no objection to the employment of Robert Heaney and furnish such employee with copies of such notification.

(b) Make Robert Heaney whole for any loss of earnings and benefits he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Post at its union office in New York City copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Underpinning and Foundation Constructors, Inc., if willing, at all places where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³In *Bricklayers Local 6 (Linbeck Construction)*, 185 NLRB 756, 759 (1970), the Board held that a union may not enforce its bylaws or internal union rules by causing or attempting to cause an employer to discriminate, against the affected employee.

⁴I shall leave to compliance any questions that may arise as to whether Robert Heaney would have been laid off in September 1990 by the Company at the conclusion of the West Fourth Street job or at any other time.